Town of Georgetown -- Appeal
Department Order #13-09, Mandatory Shoreland Zoning Act

Excerpts from the Department's Record -- Communications

- **Communication between the DEP and the Town of Georgetown**
- **Communication between the DEP and interested persons**

Morse, Michael J

From: Morse, Michael J
Sent: Friday, April 04, 2008 11:11 AM
To: 'Rick Freeman'
Cc: Carlisle, Stu
Subject: RE: Shoreland Zoning Questions

Rick, thank you for sending this along for our comment. I have reviewed the proposals and provide the following (I've responded in the same order you presented the proposals):

1. While I recall we discussed our allowing the original definition to remain in your ordinance, I believe the Department's policy regarding developed area has been misinterpreted. Our policy is intended to address areas of shoreline with **multiple** principal structures in close proximity. The language you propose would allow for up to 1000' of shoreline adjacent to a *single* principal structure to be removed from RP. Therefore we would not approve the amendment as proposed if adopted at town meeting.

In the case of multiple principal structures in close proximity, when the last one in a row is on a very large parcel, we would allow only a portion of the large parcel to be removed from RP. The portion of that parcel that could be removed from RP could be any size, up to the size of the minimum lot size requirement, but no larger. So, if someone owns 25 acres along the shoreline, only the acre, for example, of that lot that includes the principal structure could be removed from RP. Again, this is assuming there are other very nearby principal structures on other lots as well. I think we discussed an example of this a while back.

2. You may wish to check with MMA or your town attorney, but I understand from court precedence (namely Veerman v. Town of China) that the PB cannot administratively change the official zoning map. Such a change is technically a formal amendment and therefore must occur via a vote of the legislative body (town meeting in most towns). Otherwise, if you find that the proposed language and method is in fact legal, the Department will need to review each PB decision as a formal amendment and issue an approval in order for the amendment to become legally in effect.

As an aside to the above comment, I have been given the impression from other towns that applying our standards for determining developed areas is generally not a significant undertaking, especially with very good quality aerial imagery available. Should the town not have time or other resources, or interest in following this method it certainly is not a requirement to do so. Simply map the entire shoreline with RP and this will meet the State minimum requirements. Generally though, most towns make the extra effort as a service to its landowners.

3. Same comment as in the first part of response #2 above (RE: PB cannot administratively amend the zoning district).

Otherwise, we are not familiar with "state maps showing areas of sustained slopes greater than 20%" and therefore cannot comment on their accuracy. In addition, you comment on the difficulty in evaluating all the lots on these maps showing slopes 20% or greater. We generally suggest that towns simply use the USGS topographic maps that are readily available to roughly determine the obvious areas with steep slopes that may exceed 2 acres within the shoreland zone. Commonly the ordinance rewrite committee or CEO will perform a quick, non-technical, field check to

confirm the results at a few sites. We realize that this will likely miss some areas of shoreline that would meet the 20%/2-acre requirement, but those can be added if discovered in the future. Most towns do not have the resources to evaluate every piece of shoreline for this so the idea is to capture the obvious ones using a reasonable amount of effort.

4. Same comment as in the first part of response #2 above (RE: PB cannot administratively amend the zoning district).

You comment that the State's coastal bluff maps are not accurate enough to apply to your zoning map. Maine Geological Survey informed us that the developed the coastal bluff maps after personally evaluating the entire mapped shoreline. They evaluated and mapped the shoreline from the water using GPS technology to map down to as small as 150' sections of shoreline. We have also evaluated these maps and have found them to be highly accurate and therefore expect towns to incorporate the maps/data into their local zoning maps. I believe MGS will provide you the GIS mapping shapefiles for this dataset if it would aid you in developing a GIS based zoning map. Also, if the Town chose to adopt the appropriate coastal bluff language into the ordinance and referenced a map with the data, the map will need to be adopted as part of your ordinance. It could simply be identified as "Appendix A", for example. Legally though, simply stating "see the coastal bluff maps of the MGS…(website)" does not carry any regulatory weight (see Bustins Island Village Corporation v. Rosemary Thomas) and therefore would be rejected by the Department.

5. Changing the language so *de novo* appeals apply to both the PB and CEO decisions is fine with the Department.

Hopefully our comments will help to clarify these issues. Please don't hesitate to contact me with any further questions or comments.

Thank you,

Mike

Mike Morse
MDEP
Asst. Shoreland Zoning Coordinator
312 Canco Rd, Portland, ME 04103
822-6328
822-6303 (fax)

-----Original Message-----
From: Rick Freeman [mailto:rfreeman@bowdoin.edu]
Sent: Thursday, April 03, 2008 3:26 PM
To: Morse, Michael J
Cc: Carlisle, Stu; Freeman, Rick
Subject: Shoreland Zoning Questions

Dear Mike,

We are putting the finishing touches on our revisions to the Shoreland Zoning Ordinance. We have some questions about some of the specific language that we are using in several places that differs from the Guidelines. We would like your approval of our wording before we finalize this draft and take it to Town meeting in June.

1. Since 1993, our Ordinance has included a definition of developed area (approved by DEP) as follows:

"those areas, as of 18 November, 1993 which: include the actual specific developed area such as an established principal structure and associated accessory structures (including driveways, gardens and mowed areas but not including any undeveloped areas that may be on the lot); areas already approved for subdivision, or development; or for which there is a valid State approved wastewater disposal design."

We have added the following sentence to this definition:

"Any portion of any lot within 500 feet of an established principal structure shall be considered developed."

On the basis of John Evans' conversation with you back in September, we understand that this is consistent with existing DEP policy. See your e-mail to me of 9/17/07.

2. Because of the difficulty in examining over 100 lots that are presently adjacent to moderate and high value wetlands in Georgetown, many of which will meet this definition of developed, we have added the following language to Section 13. A.

Those areas which otherwise meet the criteria for inclusion in the Resource Protection District but are currently developed are not identified on the Official Shoreland Zoning Map. A determination of whether an area is exempt from the Resource Protection District because it is currently developed shall be made by the Planning Board at the time of an application for a permit by the land owner of record.

3. Regarding Section 13. A. (3) placing areas of sustained slopes in Resource Protection, we have found that the State maps showing areas of slopes greater than 20% to be inaccurate. Furthermore, if as you said to Jon Goldstein the purpose of this requirement is to prevent erosion, we think that our language in the existing ordinance is sufficient to achieve zoning objectives. Our language is:

"Areas of two (2) or more contiguous acres with unstable soil subject to slumping, mass movement, or erosion lying on sustained slopes of 20% or greater"

Furthermore, given the difficulty in examining all of the lots marked by the state as having 20% or greater slopes, to determine their status under this definition, we have added the following language to this section:

Those areas which meet this criterion for inclusion in the Resource Protection District are not identified on the Official Shoreland Zoning Map. A determination of whether an area meets this criterion for inclusion in the Resource Protection District shall be made by the Planning Board at the time of an application for a permit by the land owner of record.

4. Similarly, regarding Section 13. A. (5) which includes steep coastal bluffs in Resource Protection: our proposed language is:

(5) Land areas adjacent to tidal waters which are subject to severe erosion or mass movement, such as steep coastal bluffs. See the Coastal Bluff Maps of the Maine Geological Service, available at:

http://www.maine.gov/doc/nrimc/mgs/pubs/online/bluffs/bluffs.htm

Those areas which meet this criterion for inclusion in the Resource Protection District are not identified on the Official Shoreland Zoning Map. A determination of whether an area meets this criterion for inclusion in the Resource Protection District shall be made by the Planning Board at the time of an application for a permit by the land owner of record.

The State's Coastal Bluff maps are very difficult to read and we believe that they are not accurate enough to use on our Zoning Map.

5. Finally, in Section 16 G. regarding appeals, our Board of Appeals has asked us to change the language about administrative appeals to require that _all_ appeals of decisions of the Planning Board and CEO be _de novo_ appeals. Our Board has not discussed this; and we have not had a chance to hear from the Board of Appeals their reasons for suggesting this change. But since it is not consistent with the Guidelines, we would appreciate hearing your thoughts on the matter.

We are meeting next Wednesday (April 9) to try to wrap up our work on the language. So we would appreciate hearing from you before then.

Best regards, Rick Freeman (Georgetown Planning Board)

Morse, Michael J

From: Morse, Michael J
Sent: Monday, April 07, 2008 1:33 PM
To: 'Rick Freeman'
Cc: Carlisle, Stu
Subject: RE: More Questions

Hello Rick, I'll again respond in the same order you present your questions:

1. I just read through the court decision and see your point. I understand that decision to be based on the unique language of Georgetown's Ordinance, specifically considering a property with an approved septic plan as being "currently developed". This is in disagreement with the intent of our State Guidelines and the intent of the Mandatory Shoreland Zoning Act. Therefore, that ordinance language will need to be amended to eliminate this problem in the future. We would consider a vacant lot as undeveloped whether part of an existing subdivision or whether someone had a septic design done on the parcel many years ago. We generally allow towns to retain language that deviates slightly from the Guidelines if there is no perceived negative impact (i.e. same intent but written differently), but this court decision warrants a change. To summarize, the town will need to change the RP ordinance language and definition of developed areas to be consistent with the Guidelines.

2. Further evidence that the 'developed area' language needs to be cleared up in order to be consistent with the Guidelines. Once this is accomplished the use of aerial imagery will make a lot more sense and removing obvious true developed areas should be easier to do. Otherwise, had we still been willing to allow the use of the existing language I believe the court said that the developed areas would not be considered RP regardless of what the map shows. I can't figure out how the court could ignore Veerman v. Town of China in its review of the Moger-Harmon case.

Your last comment in #2 regarding a property owner at town meeting demonstrating his land does not qualify for RP is a good point. This is why our recommendation to towns is to use as accurate information it reasonably can and to spot check a few places to ensure accuracy. When we've had to make maps for towns with State-imposed ordinances we use USGS topographic maps for steep slope areas and only map the obvious areas. I am not aware of any that have been proven incorrect yet. As previously suggested, you will tend to miss many areas of steep slope that meet this criterion, but it's a start. Others can be added as you become aware of them. Using this widely accepted method you shouldn't have much to worry about come town meeting.

3. I hadn't commented previously about how your ordinance defines steep slopes (including unstable soil, slumping, etc) because it would require either a significant effort on the town's part, or more probable, a significant amount of money paid to a contractor/consultant to properly identify these areas. I assume that the town wouldn't want that approach. My suggestion to use a USGS topo map should suffice. But, you are right that the language really is inconsistent and is less restrictive than the Guidelines. While it is important to capture those types of areas listed, the intent is to also protect stable slopes that are 20% or steeper so that development does not de-stabilize those slopes. I suggest that the language be modified here as well to become consistent with the State Guidelines.

4. Finally, you raise a logical question regarding ledge and armored shoreline areas being identified as unstable or highly unstable on the coastal bluff maps. While I'm not aware of any armored shoreline areas (that are functioning as intended) identified as either unstable or highly unstable, there are numerous ledge areas identified in this manner. Here is Steve Dickson's (Geologist, Maine Geological Survey) reply to this concern:

"The "ledge" is the shoreline type at the toe or base of the bluff (near the high tide line). Ledge doesn't necessarily extend up hill into the bluff. There are many locations where ledge is in the intertidal zone and extending "ashore" beneath sediment that makes up a bluff. Sometimes ledge helps stabilize a bluff or make the erosion rate slower. Sometimes coastal floods, storm waves, tidal currents, or upland water discharge (groundwater or surface water) can lead to buffs being

unstable even though there is ledge at the bottom.

The map classification is composed of two parts, hence the matrix-like table in the legend. One is stability (of the sediment) and the other is the shoreline type. These are independent variables – so it is possible to get an unstable bluff "over" ledge."

They mapped these areas after personally viewing the shoreline and observing these conditions. Therefore, the highly unstable/unstable coastal bluff requirements are still present.

Thank you for your giving these issues much thought and consideration. Please don't hesitate to contact me with any further questions or comments.

Mike

-----Original Message-----
From: Rick Freeman [mailto:rfreeman@bowdoin.edu]
Sent: Sunday, April 06, 2008 5:20 PM
To: Morse, Michael J
Cc: Carlisle, Stu; Freeman, Rick
Subject: More Questions

Dear Mike,

I do have some more questions/comments about your reply.

1. In your response #1, you say, "The portion of that parcel that could be removed from RP could be any size, up to the size of the minimum lot size requirement, but no larger." But this is on conflict with a Superior Court decision in Moger and Harmon _vs._ Town of Georgetown dated 8/6/07. The decision says, " ... the entire Beaver Valley property was a 'currently developed' area at the time the Ordinance was enacted. The subsequent split of that property ... did nothing to alter this status."

If you can't get a copy of the full decision, I can have one made and mailed to you. But this seems to bind us to exempting the total area of any lot with a developed area from RP. Do you agree?

2. I can see the reasoning for your objection to our having the Planning Board make determinations of development, steep slopes, or coastal bluffs after the Ordinance has been adopted. But your suggestion that we consult aerial photos or "Simply map the entire shoreline with RP" is problematic. Part of our definition of developed area is: "areas already approved for subdivision, or development; or for which there is a valid State approved wastewater disposal design."

These will not be detectable from aerial photos. And what happens if we simply map the entire shoreline around these marshes and then someone applies for a permit and can show that the his lot meets the definition of developed area, or is not steeply sloped. Do we have to call a special Town meeting to amend the ordinance and get DEP approval before issuing the permit?

Also,if we map a lot as being in RP and the owner comes to TYown meeting and shows that the lot should be exempt because it is developed or is not steeply sloped, etc., this would probably result in a vote against the Ordinance. We want to minimize the likelihood of that happening.

3. You didn't specifically comment on our language regarding steep slopes. We copied language from our present ordinance that is different from the Guidelines. Specifically, we say, "Areas of two (2) or more contiguous acres with /*unstable soil *//*subject to slumping, mass movement, or erosion lying on */sustained slopes of 20% or greater" I've bolded and italicized the language that differs from the Guidelines. Is this language acceptable to DEP?

4. Regarding the Coastal Bluffs maps, they show two degrees of instability: Highly unstable (in red), and Unstable (in yellow. They also show four types of bluffs: Ledge, armored, salt marsh, and beach/flat. Which of these, if any, do we need to include in RP? It seems to me that we don't need to include any, since bluffs that are

armored or ledge are not likely to be "subject to severe erosion or mass movement" which is what the Guidelines are concerned about Sade for Salt Marsh or Beach/flat. Do you agree?

Morse, Michael J

From: Morse, Michael J
Sent: Monday, April 06, 2009 3:22 PM
To: 'Rick Freeman'
Cc: Evans, John
Subject: RE: Georgetown SLZ Maps

Rick & John, below are the lots that we will condition to remain in RP. All of these lots abut coastal waterfowl/wading bird habitat. Several of them were somehow allowed to be developed while being in a RP District- it is unclear to us why this would have happened. Also, because the following lots were already in RP, no notification is required for them to be conditioned to remain in RP.

R2 L11 a single existing structure on a large lot
R2 L2 structure is >250' from c.w. (coastal wetland)
R3 L7-23 not developed
R3 L7-24 structure >250' from c.w.
R3 L7-17 not developed (part of shoreline that shouldn't have been developed because of previous RP)
R4 L26-9 not developed (same as above)
R6 L7E a single structure along stretch of shoreline, built in RP
R8 L1-6 a single structure along stretch of shoreline, built in RP
R8 L1-5 not developed
R8 L1-4 not developed
R8 L1-3 not developed
R8 L1-2 a single structure built in RP, only one along this SLZ area
R8 L1-1 structure >250' from c.w.
R6 L49 a single structure built in RP, only one along this SLZ area

There were several other lots that were developed even though they were in RP, but because they now cause the entire area to meet our policy for "areas which are currently developed", we are allowing these lots to be amended to LR.

As indicated in our previous correspondence to you, whereas the Town did not delete the definition of "developed area", or substantiate to the Department what special conditions exist to warrant the relaxation of the standards, we are also proposing to delete the definition from the Ordinance.

I am completing a draft Conditional Order/ Partial Denial that addresses the above matters and I expect that it will be mailed tomorrow. We can allow the Town until 4/17 to respond to the draft Department Order. A response from the Town can include documentation of any special conditions that support relaxing the requirements.

Once you receive and consider the draft Order, please don't hesitate to contact me with any questions or comments.

Thanks,
Mike

Mike Morse
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-----Original Message-----
From: Rick Freeman [mailto:rfreeman@bowdoin.edu]
Sent: Thursday, April 02, 2009 12:10 PM
To: Morse, Michael J
Cc: Evans, John
Subject: Georgetown SLZ Maps

Mike, I understand from John Evans that you have some concerns about some of the lots that we placed in LR instead of RP. If you could give me a list of those lots, I could provide you with our reasons for treating them the way we did. Perhaps we can resolve these concerns.

Best regards,

Rick Freeman
Georgetown Planning Board

Morse, Michael J

From: Morse, Michael J
Sent: Tuesday, April 07, 2009 10:38 AM
To: 'Rick Freeman'
Cc: Stu Carlisle; Evans, John; Grant, Bud; Jones, John; Collins, Charlie; Jack Schneider; Bob Trabona
Subject: RE: More on Georgetown's Maps

Rick, I'm in the middle of reviewing other ordinances now, but look forward to receiving and reviewing your comments. What would work best is for you to make all your comments regarding the draft Order in one email or letter so we can keep it all straight.

Generally speaking though, we had talked about allowing the town to do the following:

1) apply the standard DEP policy regarding developed areas (as prescribed by DEP, not the Georgetown definition)

2) if the town insists going above and beyond for large lot owner with a single principal structure, we would allow a reasonable building envelope around the developed structure to be LR and the remaining as RP- this really does go beyond our policy, but we were willing to bend this much to help the town. I trust the town realizes and appreciates this fact.

3) delete or significantly alter the "developed area" definition in the ordinance to comply with the Guidelines (see previous emails...), or DEP would do so.

When I reviewed the adopted map, I considered the above, and came up with the 14 lots. There were several others that should have also remained in RP, but for various reasons (site specific conditions) I did not include them. It appeared that you addressed the first bullet well, but not the second (or third, for that matter). There are several lots, I believe yours included (?), where the only structure on the lot is outside the 250-foot slz and this development cannot be an influence on the slz district. We cannot create the building envelope LR areas for the town (bullet #2) in our conditional order so we must revert back to the former RP designation. In the future, the town most certainly can consider amending the map accordingly.

Otherwise, please consider the (very brief) reasons I sent previously as you consider your response.

Thanks,
Mike

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-----Original Message-----
From: Rick Freeman [mailto:rfreeman@bowdoin.edu]
Sent: Tuesday, April 07, 2009 10:05 AM
To: Morse, Michael J
Cc: Stu Carlisle; Evans, John; Grant, Bud; Jones, John; Collins, Charlie; Jack Schneider; Bob Trabona; Freeman, Rick
Subject: More on Georgetown's Maps

Mike, I've just looked at the draft map that you marked up for us last year. What we did with R6 L-49 (putting the part of the lot with the house on it in LR and the rest in RP) is exactly what you recommended that we do on the adjoining lot U2 L-2. These two lots are quite similar . So I am surprised that you are objecting to what we did.

We are looking into the situation with the other two lots you have questioned.

Best regards, Rick Freeman

Morse, Michael J

From: Rick Freeman [rfreeman@bowdoin.edu]
Sent: Monday, April 06, 2009 8:14 PM
To: Morse, Michael J
Cc: Stu Carlisle; Collins, Charlie; Evans, John; Freeman, Rick; Grant, Bud; Jones, John; Jack Schneider; Bob Trabona
Subject: Re: Georgetown SLZ Maps

Mike, Thanks for providing the list of lots that you have concerns about. I hope that you can hold off on the formal "Partial Denial until we have a chance to respond informally and perhaps clear up some of your questions. My main concern is that 10 of the 14 lots you list are in subdivisions that were approved prior to 1993. I have noted these with bold comments in your list pasted in below. They fit our definition of "developed" and therefor under the Guidelines they should be exempt from RP. By the way, I remember a conversation with you in your office in which you said that since the DEP approved our definition of developed in 1993, you would probably have to let us keep it in this revision.

As for R2 L 11 (where I live), the house was built in 1977. A substantial part of this lot has been place in RP. The part in LR is where the house sits and includes lands adjacent to the Swett marsh that have been maintained as pasture since 1977. This would also qualify as developed under our definition.

As for the other three lots, we will have to look into this. I can't verify the location of the house (R2 L2) or when the house was built (R6 L7-E). And with R6 L49, wouldn't we still have to place the area around the house in LR?

I have not run this reply by the rest of the Board. So it is not an official response. But I am pretty sure that the rest of the Board will have similar concerns when we meet formally.

Best regards, Rick Freeman

> R2 L11 a single existing structure on a large lot
> R2 L2 structure is >250' from c.w. (coastal wetland)
> R3 L7-23 not developed *Bowmans Landing*
> R3 L7-24 structure >250' from c.w. *Bowmans Landing*
> R3 L7-17 not developed (part of shoreline that shouldn't have
> been developed because of previous RP)* Bowmans Landing*
> R4 L26-9 not developed (same as above)*Beaver Valley*
> R6 L7E a single structure along stretch of shoreline, built in RP
> R8 L1-6 a single structure along stretch of shoreline, built in RP *Little River Farm*
> R8 L1-5 not developed **Little River Farm**
> R8 L1-4 not developed **Little River Farm**
> R8 L1-3 not developed **Little River Farm**
> R8 L1-2 a single structure built in RP, only one along this SLZ area **Little River Farm**
> R8 L1-1 structure >250' from c.w. **Little River Farm**
> R6 L49 a single structure built in RP, only one along this SLZ area
>
>

Morse, Michael J

From: Morse, Michael J
Sent: Wednesday, April 22, 2009 3:27 PM
To: 'Rick Freeman'
Cc: Stu Carlisle; 'evans@brunswickmaine.com'; Bob Trabona; Jones, John
Subject: RE: Response to April 7 Letter and Draft Order

Rick, I'm sorry you felt there was not adequate time to respond to our draft Order by 4/17. Generally we strive to provide a full week to respond, but in your case 10 days. Even though we are now beyond that date, I still have not received any formal response from the Town so we intend to proceed with issuing the Conditional Order. However, I do wish to take a few minutes to respond to a few of your questions and points in your message, below.

In terms of the "developed area" matter, you and I did discuss this at great length over the past several years. I explained the policy to you verbally and am quite certain I provided you a copy of the Department's policy (in a newsletter article format). In various email correspondence the Department offered an even more relaxed alternative to the policy, the policy that every other municipality must adhere to, by allowing a small developed portion of a larger parcel to be excluded from RP zoning.

On several occasions we discussed the definition of "developed area" in your ordinance and as you should certainly recall from our meeting on July 8, 2008, I advised you that the Department would not allow the definition to remain unless the town substantiated to the Department in writing, why we should allow the town to continue to use a definition that does not comply with the minimum requirements. After our conversation I fully expected a quantification of the parcels with outstanding pre-approved septic systems and those that were sub-divided before 1993 (e.g. how many lots and which ones???) to be submitted to us in short order. We also have record of email correspondence with you where we indicate that we will not accept the definition to remain (without evidence that it is somehow otherwise warranted). Why did the town fail to submit this documentation to the Department and now ask why we are not accepting the continued non-compliance with the minimum requirements? In light of the draft Conditional Order, why do I not have this documentation on my desk presently if this was of such concern to the Town?

In addition, you inquire why we did not provide any comment regarding the definition during our review of the draft ordinance. After the lengthy discussions and multiple email correspondences we had, I assumed that by leaving the definition in the ordinance and not substantiating the relaxation, it had simply been the town's decision to leave it in and hope the Department would not ultimately require its removal. It certainly did not seem appropriate to raise the issue yet again.

Finally, please realize that the Department cannot ignore the requirements of the Mandatory Shoreland Zoning Act (Act), 38 MRSA §435-449. The Act requires municipal ordinances to be no less restrictive than the minimum Guidelines. However, the Act also states when a municipality determines that special local conditions require a different set of standards from those in the minimum Guidelines, "the municipality shall document the special conditions and submit them, together with its proposed ordinance provisions, to the commissioner for review and approval." To date, the town has not submitted such documentation. If, at some point in the future the town decides to document any special conditions and submit them to the Department, we will consider such conditions and any proposed changes to its ordinance.

The Department expended significant resources to assist the town with its shoreland zoning changes (30+ emails with just you directly, countless telephone conversations, personal meetings to discuss changes, and site visits) in an attempt to achieve an ordinance that would comply with the State minimum requirements. Unfortunately the adopted ordinance fell short of our expectations. However, we look forward to continuing working with the town as it seeks to bring the ordinance into full compliance. Thank you for contacting us with your comments and concerns.

Mike Morse

Mike Morse
MDEP
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-----Original Message-----
From: Rick Freeman [mailto:rfreeman@bowdoin.edu]
Sent: Thursday, April 16, 2009 6:20 PM
To: Morse, Michael J
Cc: Freeman, Rick
Subject: Response to April 7 Letter and Draft Order

Dear Mike,

The Planning Board has decided that since it wants to work together with the Selectmen in consultation with the Town Attorney on its response to the Draft Order, there is not sufficient time to prepare a formal response by Friday, the 17th. But the Board has asked me to convey our concerns about the proposed action to you in the hope that as you become aware of the reasons for our decisions you will reconsider the Draft Order.

I will focus these comments on the proposed requirement that the Town delete our definition of a "developed area" from the ordinance. This is because essentially all of the lots in the list of 14 that you propose to require being placed in Resource Protection are developed according to our definition.

The Draft Order says that "The removal of the Resource Protection District from these lots does not comply with the Guidelines or the Department's policies for establishing 'areas which are currently developed.'" But the Guidelines are silent as to how to determine if an area is "currently developed." There is no definition of "developed " in the Guidelines. We regard this as a fundamental flaw in the Guidelines.
The Georgetown ordinance has included a definition of "developed area"
since 1993. That definition was approved by DEP in 1993. And although the Draft Order makes reference to "the Department's policies for establishing 'areas which are currently developed,'" we are not aware of any written formal DEP policy on this matter. If there is such a policy, please send us a copy.

Furthermore, as we worked to finalize the language in our new ordinance, I came to the conclusion that the department would, if reluctantly, continue to accept our definition.
There are two reasons for this.
First, according to notes I took during a meeting with you in your office on July 8, 2008, you said something to the effect that you were

"still uncertain as to our definition of developed. How many lots does that affect? Not many. Probably will go along with it." (Quotation is from my notes.)

And second when you returned marked up pages of our draft ordinance in early October of 2008, you did not include any marks or comments on the page that included our definition in Section 17.

As I understood it, at the time of our conversation in August 2008, most of your concern regarding our definition stemmed from the inclusion of the existence of a valid septic design as a criterion for exemption from RP. Recall the many mentions of the Harmon-Moger decision and the exchange of messages between Town Attorney Stinson and you on April 16 and April 25, 2008.. It is now clear that the important issue is the inclusion of location in a subdivision approved prior to 1993 and that the septic design issue is essentially moot. We think that this gives further reason for you to reconsider the Draft Order.

In light of this history, we hope that you will reconsider your rejection of our definition of "developed area."

Best regards,

Rick Freeman

Additional correspondence with other interested parties

Morse, Michael J

From: Jjossmith@aol.com
Sent: Friday, July 03, 2009 10:42 AM
To: Morse, Michael J
Cc: Jrlittells@aol.com
Subject: Fwd: Georgetown Shoreland Zone Ordinance

Dear Mike:

Thank you very much for taking the time to meet with us yesterday and allowing us access to the DEP's files.

We will consider ways to continue our support of the DEP's effort to remove the definitional "loophole" from the Georgetown SZO. We find the Town's appeal argument (that the SZO definition is consistent with DEP guidelines) faulty on its face. The Guidelines address development that involves physical change, while the SZO definition encompasses development "on paper" as well as actual physical change. Town approvals of subdivisions and wastewater system designs in themselves make no physical change. The problem with the Town's loophole provision is amply demonstrated in our own situation with our abutting property. The Superior Court deemed the subdivided Harmon/Moger lot "developed" under the terms of the SZO, even though there was no physical change on that lot. The only "change" involved was a 15 year old septic system design which was never built – anywhere. But the mischief of the loophole extends beyond this case.

The loophole allows for creeping incursions into otherwise RP districts. For example, an owner of a 100--acre "grandfathered" lot [exempted solely by dint of the owner's having had the foresight to procure by the 1993 deadline a septic system design approval for a single residence] could later subdivide into 50 lots [meeting the minimum 2-acre building lot requirement], each of which would be "grandfathered" from inclusion within the RP district regardless of physical characteristics.

We were pleased to learn that the Superior Court's decision in Harmon/Moger v. Georgetown did not enter into play in your deliberations-- as that ruling does not preclude the DEP's decision no longer to allow Georgetown to perpetuate the SZO "loophole".

We hope that the DEP will have an opportunity in the course of the appeal/remand process going forward to reconsider its decision not to challenge the Town's exemption of the environmentally fragile Harmon/Moger property.

John & Joyce Smith
195 Beaver Valley Road
Georgetown, Maine 04548

July 3, 2009

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From: Jjossmith
To: Michael.J.Morse@maine.gov
Sent: 6/29/2009 11:26:27 A.M. Eastern Daylight Time
Subj: Re: Georgetown Shoreland Zone Ordinance

Hi Mike,

When might you have time for me to visit you in your office between now and July 14 ?

I am a bit confused by your reply to my inquiry, since I understand that the DEP is requiring that another abutting property to the one in question [R-4, L-26A] must be listed as RP. I would also like to review your correspondence file with the Town of Georgetown.

Please call me at 202.257.1066 or reply to this e-mail if more convenient.

Thanks again,

John

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whom it is addressed, and may contain confidential or privileged information. If you received this message in error, please do not use, forward, print, or copy it. Please destroy it (and all attachments) and notify me immediately of the error at (202) 966-2414 or at jjs204@columbia.edu. Thank you.

In a message dated 6/4/2009 3:03:51 P.M. Eastern Daylight Time, Michael.J.Morse@maine.gov writes:

> John, sorry, you had already provided the map/lot number as you state. R4 L26-A was not required to be RP because the surrounding areas of shoreline met our developed area policy. This policy considers the density of principal structures along an area of shoreline, and in this case includes development on the opposite side of the finger of marsh to the east of the property in question. Had it not met our developed area policy, we would have required that all the lots around this portion of wetland be zoned as RP, including those already developed.
>
> Hopefully this helps to answer your questions.
>
> Thanks,
>
> Mike Morse
>
> *Mike Morse*
>
> *MDEP*
>
> *Asst. Shoreland Zoning Coordinator*
>
> *312 Canco Rd, Portland, ME 04103*
>
> *822-6328*
>
> *822-6303 (fax)*

From: Jjossmith@aol.com [mailto:Jjossmith@aol.com]
Sent: Friday, May 29, 2009 10:11 PM
To: Morse, Michael J
Cc: Jrlittells@aol.com
Subject: Re: Georgetown Shoreland Zone Ordinance

Thanks for the prompt reply, Mike.

I am not sure what you mean by "physical address" of the property, but the postal address is 199 Beaver Valley Road. My wife and I reside part-time at 195 Beaver Valley Road. The Beaver Valley Association lists the Harmon/Moger lot as "Lot S2", although neither Harmon/Moger nor we are members of the Association.

I already gave you the tax map numbers.

You have no doubt seen the Town SZO maps -- Map #2 shows the Harmon/Moger property to be within the Resource District [but for the loophole]. Its hard to follow. I can walk you thru it if you wish. The Georgetown SZO maps may be found at:

http://www.maine.gov/local/sagadahoc/georgetown/844.html

I offer a little more background, which will show how this "loophole" produces such odd results.The history of the lot in question shows that the original owner -- Coffey -- filed a pro forma waste water disposal plan just under the wire to avoid inclusion of his 33+ acre property under the impending SZO within the RP district. [This is all set out in the court records.] So, under the peculiar terms of the SZO, the whole Coffey lot was already deemed grandfathered as "developed" when Coffey sold the wholly undeveloped 33+ acre property to Harmon/Moger in 1996. Later, in 2002, Harmon/Moger subdivided the lot into two pieces, sold a lot with 1997-built house and driveway to me and my wife, and retained an undeveloped piece consisting of two acres of "upland" and 18 acres of marsh.

They submitted a building permit, and argued that the Coffey exemption [which was based on a never built system, on either lot!] carried over to their retained portion after the subdivision [and even though the Coffey design was not sited on their retained piece but on our lot!]. Georgetown disagreed, but the court agreed with Harmon/Moger. Regrettably, but understandably, since the "loophole" language is not a model of clear English, and the court read the

language differently [although I think it failed to read the ambiguous language in light of the purposes of the SZO and underlying Maine statute].

If you care to visit the Harmon/Moger property you will see that much of the upland portion is filled with vernal pools [really, wet all year round] and is otherwise environmentally sensitive and unsuitable for development. As an abutter, I have very serious concerns with the capacity of the soils on the site to support a 3-bedroom septic system as proposed in Harmon/Mogers' soon-to-expire building permit extension. No development whatsoever has occurred on their lot. I offered twice to buy the property from Harmon/Moger, but we were not been able to reach agreement.

I am trying to interest one of the conservation agencies [Nature Conservancy, Kennebec River Estuary, Dept. of Inland Fisheries and Wildlife, etc.] in acquiring the property. As always, its a question of price and available money. Harmon/Moger have listed the property for sale [MLS#909990]

Let's discuss when convenient for you, thanks.

John

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In a message dated 5/29/2009 4:33:15 P.M. Eastern Daylight Time, Michael.J.Morse@maine.gov writes:

> John, I do recall speaking with you a few years ago regarding the Harmon/Moger case. Can you tell me the physical address of the property, or your property next door? Or better yet, can you email me a map of some sort to point me to the property? I'd like to look at the zoning map so I can respond to your question. DEP does have our own policy for determining whether an area of shoreline is developed densely enough that it warrants allowing a residential district rather than RP. This might be the reason why, but I'd like to confirm.
>
> Thanks,

Mike Morse

Mike Morse

MDEP

Asst. Shoreland Zoning Coordinator

312 Canco Rd, Portland, ME 04103

822-6328

822-6303 (fax)

From: Jjossmith@aol.com [mailto:Jjossmith@aol.com]
Sent: Friday, May 29, 2009 3:47 PM
To: Morse, Michael J
Cc: Jrlittells@aol.com
Subject: Georgetown Shoreland Zone Ordinance

Hi Mike,

You will recall my speaking with you in the past regarding the then current Georgetown SZO, and the "developed area" loophole issue, which arises out of a very peculiar definition in that local ordinance (in effect grandfathering lots of any size whatsoever if the owner was clever enough long ago to obtain approval of a theoretical septic system design). I understand that the DEP has conditionally approved the new Georgetown SZO, but is requiring that this definition of "developed area" be removed, and that accordingly 14 lots otherwise so "grandfathered", will now be included within the Resource Protection District category. This information comes from Rick Freeman of the Town Planning Board. I understand you have been in communication with him on this matter.

I am pleased with the DEP's action, as I have long contended that this loophole was contrary to the purposes of the underlying statute and the express purposes of the SZO itself. But I would like to know why the Harmon/Moger property on Beaver Valley Road (Map/lot 04R-026-A, which property abuts my own and which was subject to judicial action, as you may recall) was not included within the list of 14 affected properties. The Town of Georgetown did not prevail on appeal of the Town Board of Appeals' decision that the Harmon/Moger lot lost its grandfather status under the loophole definition when it was later subdivided from my lot. However, that court decision -- which merely read the "loophole" definition differently from the Town -- should not operate to freeze in perpetuity the status of the Harmon/Moger lot, which I understand is not unlike the status of other wholly undeveloped lots among the 14 lots listed by the DEP as properly belonging within the Resource Protection District. If the definition no longer grandfathers other similarly situated lots, why would it still apply to the Harmon/Moger lot? The court simply interpreted the terms of the SZO as it then existed. It did not mandate that the definition remain unchanged as to the lot in question.

I do not have access to the Town's public file or the DEP file at this time. Can you help me understand the DEP's reasoning?

When you have a moment, could you give me a call? 202.257.1066

Thanks in advance.

John

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